82-1089

No. _____

IN THE

Supreme Court of the United States

October Term 1982

THE CITY OF MARIETTA, GEORGIA
and MAYOR AND COUNCIL OF THE
CITY OF MARIETTA, GEORGIA
Petitioners

v.

ED DILLS, d/b/a MID-GEORGIA
SUPPLY and JAMES M. TUCKER,

Respondents

ON WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT
UNITED STATES COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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[1] The caption contains the names of all parties.

QUESTIONS PRESENTED FOR REVIEW

- 1-

Are time, place and manner restrictions on pure commercial speech justified when weighed against the community need for safety regulation and aesthetic and economic development?

- 2 -

(a) Does the decision of a state court of last resort, and thereafter the denial of certiorari by the United States Supreme Court bind a federal appeals court on the same federal constitutional issue which was fully and fairly litigated in the state court?

(b) Does the doctrine of res judicata preclude similarly situated plaintiffs from relitigating identical issues in separate actions and separate forums?

LIST OF PARTIES

See footnote one (1).

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GROUNDS FOR JURISDICTION

(i) The Petition for Writ of Certiorari arises from the opinion of the United States Court of Appeals for the Eleventh Circuit in the case of *Ed Dills, d/b/a Mid-Georgia Supply and James M. Tucker v. The City of Marietta, Georgia and Mayor and Council of the City of Marietta, Georgia,* –F2d– (1982) which was decided on May 6, 1982.

(ii) A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 30, 1982.

(iii) The statutory provision believed to confer jurisdiction on the United States Supreme Court is 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

STATEMENT OF THE CASE

With the stated purpose "to provide standards to safeguard life, public health, property and welfare by regulating the location, size, illumination, erection, maintenance and quality of materials of all signs, and all signs and outdoor advertising structures," the Mayor and City Council of the City of Marietta, Georgia enacted Two (2) ordinances [1] restricting, but not completely banning, the use of "portable display signs" within the corporate limits. A "portable display sign" was defined as a mobile/temporary electrical or non-electrical sign that is mounted on a trailer type frame with wheels or skids or portable wood or metal frame and not permanently attached to the ground". [2]

A group of signmakers and businessmen banded together to challenge the ordinances on the ground that they amounted to "an abuse of police

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[1] City of Marietta Ordinance No. 3315 (enacted August 10, 1977) and No. 3479 (enacted March 14, 1979). The regulations of portable signs contained in Ordinance No. 3315 (designated as Article II, Section 7 in the "Marietta Sign Ordinance") included restrictions on the placement, size, illumination and transportation of portable signs, but plaintiffs only challenged that portion of the ordinance which provided as follows:

> A permit shall not be valid for longer than a period of one hundred twenty (120) consecutive days after which time the portable display shall be removed from the building set back lines of the premises. A permit cannot be renewed nor can a permit be obtained for the same premises within a period of thirty (30) days after the removal of a portable display from the building set back area of the premises.

This provision was effectively amended (but remains in the "City Sign Ordinance") by Ordinance No. 3479 adding Article V, paragraph 9. That addition reads as follows:

> 9. Portable Display Signs are to be permitted only in the following conditions:
>
> a. Opening or closing of a business, not to exceed thirty (30) days.
>
> b. Special sale, promotional event, or change of ownership or management, not to exceed twice in any twelve (12) month period, for a maximum of fifteen (15) days.
>
> c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period.
>
> d. For traffic direction during road construction or emergency situations.
>
> e. For political campaigns, for a maximum of thirty (30) days before any election.

[2] City of Marietta Ordinance No. 3315, Art. II, Para. 30, as amended.

power of the City of Marietta, deprived them of their property without just compensation, and without due process of law, denied them freedom of speech and constituted an impairment of contracts." [3] Despite this seemingly comprehensive challenge to the city sign ordinances, the challengers only addressed one issue in the various ensuing litigations: The city was impermissibly attempting to regulate aesthetics through police power, and this had the effect of denying the right to commercial speech.

The legal challenge to the ordinances was first made in the Superior Court of Cobb County, Georgia. [4] The trial court upheld the constitutionality of the ordinance, and the decision was appealed to the Georgia Supreme Court. [5]

The supreme court of Georgia upheld the trial Court based on both aesthetic and public safety reasons. They held:

> "Although aesthetics are an important incidental effect of regulations, *Berman v. Parker,* 348 U.S. 26 (1954), aesthetics, being merely a question of subjective taste, would not alone be enough to support the legislation here under the police power. See *City of Smyrna v. Parks,* 240 Ga. 699 (242 SE2d 73) (1978). This ordinance, however, is clearly reasonable meant to regulate signs which are, in their very nature, temporary. The regulations are designed to prevent the use of these temporary signs where a permanent one would be more conducive to the safety and welfare of the public. We do not find these ordinances arbitrary or discriminatory.
>
> Having held that the regulation of these temporary signs is reasonable and within the police power, and noting that, although their

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[3] *Thomas v. City of Marietta,* 245 Ga. 485, 265 SE2d 775 (1980). *Dills v. City of Marietta,* No. 81-7294 (11th Cir., 1982). These enumerations of error show the basis for federal jurisdiction as is required by Rule 21 (1) (h) of the Supreme Court.

[4] *Thomas, et al. v. City of Marietta,* Superior Court of Cobb County, Civil Action No. 79-1603 (1979).

[5] *Thomas, et al. v. City of Marietta,* 245 Ga. 485 (1980).

use is restricted, it is not prohibited, it follows that there is no merit to appellants' due process, inverse condemnatiion, freedom of speech, or impairment of contracts claims. *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), is distinguishable for this reason."

Thereafter, the aggrieved signmakers filed a Petition for Writ of Certiorari to this Court. Certiorari was denied at 449 U.S. 838 (1980). Contemporaneously with the filing of certiorari, the Plaintiffs filed an original action in the United States District Court for the Northern District of Georgia alleging the same constitutional violations as in the state court action. [6] The action was dismissed on the ground of res judicata. Notice of Appeal was filed with the Fifth Circuit U.S. Court of Appeals, but was later dismissed. [7]

Once certiorari was denied by the United States Supreme Court, and the District Court dismissed the second action on res judicata grounds, the signmakers regrouped and refiled the instant action in the United States District Court, Northern District of Georgia. [8] This time, however, two new city signmakers were substituted as Plaintiffs, who are now the present respondents, and none of the old Plaintiffs were made parties. No new grounds were lodged, nor were any new theories explored. The same lawyer represented both groups of Plaintiffs.

A new evidentiary hearing was held and the matter was taken under advisement by the District Court. On March 20, 1981, Charles A. Moye, Jr., District Judge, entered a 38 page Order in favor of the signmakers holding that res judicata did not apply, and that the ordinances were impermissible limitations on the signmakers' right to commercial speech. [9] In this Order, Judge Moye noted as follows:

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[6] *Thomas, et al. v. City of Marietta*, Civil Action No. C80-4344, United States District Court, Northern District of Georgia (1980).

[7] *Thomas v. City of Marietta*, Docket No. 80-7753 (5th Circuit, 1980)

[8] *Ed Dills, James Tucker v. City of Marietta*, United States District Court, Northern District of Georgia, Civil Action File No. C80-2001A, (1981).

[9] *Dills v. City of Marietta*, (Order, J. Moye, p. 37)

> "In reaching this conclusion, the Court has reluctantly reached a decision that is somewhat at odds with the rulings of the State Courts in *Thomas*. It should be noted, however, in reaching this decision, the Court has considered several legal theories which the plaintiffs apparently failed to present to the Georgia courts. This Court reached the merits only after deciding that *Thomas* has no preclusive effect here. Under the United States Constitution the State courts are, of course, as competent as federal courts to rule on federal constitutional issues. If we were writing on a clean slate, we might well conclude that principles of federalism and preclusion by prior judgements makes *Thomas* binding here. For the reasons set forth in Part I of this Order, however, we do not reach that conclusion. Regrettably we have had to do the same work done by the judges in the State court system, even though there is not a hint or suggestion, in or outside of the record, that the *Thomas* plaintiffs received anything other than the fairest, most competent treatment at the hands of the State courts. Even more regrettably we have reached a decision that is different from that reached by the State courts in *Thomas*."[10]

The City of Marietta appealed this decision to the Fifth Circuit United States Court of Appeals. The case was subsequently transferred to the new Eleventh Circuit. In a much shorter opinion than that of the District Court, the Eleventh Circuit upheld the Order of the District Court. The Court summarily held that res judicata did not apply since the parties in the *Thomas* litigation were not the same as those in the *Dills* litigation. The Eleventh Circuit also affirmed the lower Court decision concerning the commercial speech issue relying on the recently decided case of *Metromedia, Inc. v. City of San Diego.*[11]

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[10] *Dills v. City of Marietta*, (Order, J. Moye, p. 38).
[11] 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981).

In determining the validity of governmental restriction on commercial speech, the Circuit Court held that a partial ban on portable signs, as contemplated by the Marietta Ordinance, does not directly advance the stated governmental interest in traffic safety. The Court also held that the piecemeal attempt to regulate portable display signs is impermissible. Furthermore, the Court held that aesthetics would not be a proper consideration in support of a partial ban on portable display signs.

From this long and tortured history, the Petitioner offers two questions, one procedural and one substantive, for this Court's consideration.

REASONS FOR ALLOWANCE OF THE WRIT

The statement of the case suggests two timely issues which are ripe for review. First, substantively, is the issue of pure commercial speech and its regulation. Second, is the proper relationship of the states and federal courts in deciding federal constitutional issues.

I. COMMERCIAL SPEECH

Petitioner enacted two ordinances which admittedly restrict the way that commercial speech can be disseminated. The ordinances materially restrict the use of a particular type of sign, a portable display sign.

The City, in enacting these restrictions, employed a generalized statement of purpose: "to provide standards to safeguard life, public health, property and welfare. . ." Throughout the entire litigation the City has maintained two arguments in support of these restrictions. First, that the public health and safety considerations override an advertiser's right to use this type of sign.[12] Secondly, the City contends that it can enforce aesthetics through the police power.

Initially, the twin arguments of the city were persuasive: they were upheld throughout the entire state court litigation. Indeed, once this court's decision in *Metromedia,* supra, was published, the City's position appeared to be vindicated.

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[12] Petitioners presented uncontroverted evidence at the District Court evidentiary hearing, by a City of Marietta police officer who testified that he has seen portable signs blow over into the street and short circuit, creating a traffic hazard. *Dills v. City of Marietta,* CAF C80-2001A, United States District Court, Northern District of Ga., T-77.

In the Eleventh Circuit, the Court properly focused on the four-part test set forth in *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 (1980). The Court ruled that (1) the Marietta ordinances clearly encompass speech that is not misleading and that concerns lawful activity; (2) substantial governmental interests exist in the promotion of traffic safety and aesthetics; (3) the ordinances do not directly advance the claimed interest in traffic safety because the ban is not complete; and (4) the ordinances reach farther than necessary to accomplish the given objective since the purpose of the ordinance (traffic safety and aesthetics) could be accomplished by merely requiring the signs to be anchored. Thus the ordinance was held over inclusive.[13]

There are certain exceptions to the ordinances. Temporary signs may be displayed for certain activities for certain times and conditions. See: Ordinances 3315, 3479, cited in Appendix. Thus, the Eleventh Circuit was correct in noting that the ordinances are piecemeal in attempting to regulate portable signs. Nevertheless, the Court noted that: ". . . While a governmental entity may legitimately decide to remedy a problem on a piecemeal basis, at some point exceptions can become so inconsistent with the claimed statutory purpose as to render unreasonable any assertion that the measure furthers the claimed governmental interest."[14] For this particular reason the ordinance was declared invalid.[15]

Petitioner contends that a major error of the Eleventh Circuit opinion is the direct contravention to the holding of this Court in *Metromedia*, supra. In *Metromedia*, this Court stated that:

> "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no farther than necessary in seeking to meet its ends. Indeed, it has stopped short of fully

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[13] Petitioner does agree that the same sign contemplated by the portable sign ordinance, if permanently attached to the ground would not be regulated by the ordinances in question. Only portable signs are contemplated by these ordinances.

[14] *Dills, supra* at 1129.

[15] It is interesting to note that the conclusion of the 38 page Order of the District Court was invalid because it did not leave open ample alternatives for other communication. Order, p. 37.

accomplishing its ends: It has not prohibited all billboards, but allows on-site advertising and some other specifically exempted signs."

"In the first place, whether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising. Second, the city may believe that off-site advertising with its periodically changing content, presents a more acute problem than does on-site advertising. (Citation omitted). Third, San Diego has obviously chosen to value one kind of commercial speech -- on-site advertising -- more than another kind of commercial speech -- off-site advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance -- on-site commercial advertising -- its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise -- as well as the interested public -- has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. (Citations omitted.) It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted."

Thus, while this Court directly states that a municipality need not fully prohibit signs, the Eleventh Circuit says that it must, or the ordinance is unconstitutional. As such, petitioner contends that the Eleventh Circuit has failed to properly apply the rules set down by this Court for determining the validity of commercial speech.

Petitioner further contends that this case is sufficiently distinguished from *Metromedia* such that a new question is presented concerning the commercial speech doctrine. The Court will recall, *Metromedia* was challenged on the ground that the ordinances in question restricted non-commercial, as well as commercial speech. Ultimately, because the San Diego authorities did not accord the same protection to non-commercial

speech as they did to commercial speech, the San Diego ordinances were held to be unconstitutional.

The case sub judice does not contain the non-commercial considerations that beset *Metromedia*. This Court is asked to decide a relatively narrow question: Are restrictions on the use of portable display signs justified for public health and safety reasons when matched against a businessman's right to disseminate commercial speech? The ordinances are not challenged on non-commercial speech grounds. [16]

The significance of this difficult constitutional issue is readily seen by the fact that the answer thus far has been decided antithetically by a state court of last resort, the supreme court of Georgia, and the United States Court of Appeals for the Eleventh Circuit. Both decisions are appended to this petition.

Finally, the commercial speech question here is one that has the interest of every municipality in the nation. The Eleventh Circuit has now set forth new restrictions upon the power of municipalities to regulate the health and safety of its citizens. The City of Marietta does not wish to allow portable signs next to the road which are distracting to motorists, and unsafe, in that they easily blow over into the roadway and break up. These signs are also unsightly and destructive of property values according to the judgment of the City Council of Marietta. These, in the past, have been valid reasons for enacting restrictions on such signs. Now, they are not. Every city, at least within the Eleventh circuit, is now unsure of what power they have to regulate these type signs. For this reason, Supreme Court guidance is requested.

II. RES JUDICATA

A second issue arises from the facts of this case concerning federal civil procedure. As previously stated, the petitioner originally had the substantive issue enumerated above, decided in its favor, by the supreme court of Georgia. Indeed, when that opinion was filed, the respondent applied for certiorari to this Court. It was denied.

Respondent's attorney undauntedly refiled in the District Court. He presented two new signmakers and thereafter dropped all those plaintiffs who were in the state court action. Although the petitioner plead res judicata, the District Court held that the principle was inapplicable. The District Court observed that:

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[16] See *Dills v. City of Marietta*, opinion of District Court, Footnote 3.

"Here the same attorney has represented the plaintiffs in all cases. All cases involve the same claims and defenses based upon the same facts. All cases involve plaintiffs who are similarly situated. There is no aspect of the state court litigation which can be deemed unfair or less than fully litigated." Order, Judge Moye, p. 10.

Nevertheless, since the parties were not identical to those in *Dills* and *Thomas* res judicata did not apply.

Petitioner suggests and contends that the matter was originally res judicata, under the doctrine of "virtual representation" set forth in *Chicago, Rock Island & Peoria Rwy. Co. v. Schendel,* 270 U.S. 611 (1926) and *Heckman v. United States,* 224 U.S. 413 (1912). Petitioner suggests pursuant to the cases cited above that the principles of res judicata cannot be subverted by the mere substitution of similarly situated parties, as plaintiffs below sought to do.

More importantly, petitioner contends that the District Court was bound by the decision of the supreme court of Georgia, regarding the federal constitutional question.

The District Court politely noted that in overruling the supreme court of Georgia, ". . . the Court has reluctantly reached a decision somewhat at odds with the rulings of the state courts in *Thomas*. . . Regrettably we have had to do the same work done by the Judges in the state court system, even though there is not a thing or suggestion, in or outside of the record, that the *Thomas* plaintiffs received anything other than the fairest, most competent treatment at the hands of the state courts. . ." Order, Judge Moye, p. 38.

Nevertheless, the District Court justified its reversal of the Georgia supreme court on the ground that ". . . (this) Court has considered several legal theories which the plaintiffs apparently failed to present to the Georgia courts." Order, Judge Moye, p. 38.

In point of fact, the plaintiffs presented no new legal theory to the District Court either. The pleadings and arguments were the same.

The Georgia supreme court is a court empowered to decide questions concerning the Federal Constitution just as a federal appeals court does. The proper recourse for a party who wishes to appeal from a state supreme court is to apply for certiorari to this court. That, indeed, is exactly what was done here. The denial of certiorari should have been the end of this matter.

The explosion in litigation that courts have seen could be materially curtailed by adopting a clear rule barring the unnecessary relitigation of cases already fully and fairly decided.

Petitioner suggests that where a state court of last resort gives full and fair consideration to a question of federal constitutional law, and certiorari to the United States Supreme Court is denied, all other courts should be barred from relitigating the matter unless some new and compelling consideration arises.

This issue is undoubtedly ripe for the Court's consideration in that it offers a chance for the Court to reduce unnecessary and expensive litigation.

CONCLUSION

This petition presents an opportunity for the Court to decide two issues of significant interest. First is the opportunity for further definition of the interplay of the First Amendment on the commercial speech doctrine. Secondly, is the opportunity to enunciate a clear rule of law regarding the res judicata effect of a federal constitutional issue decided by a state court of last resort and a United States District Court. It is respectfully requested that the Court grant this petition.

BARNES AND BROWNING, P.C.

ORIGINAL SIGNED BY
ROY E. BARNES

By: _____
ROY E. BARNES

Original signed by
Thomas J. Casurella

By: _____
THOMAS J. CASURELLA

166 Anderson Street
Marietta, Georgia 30060
(404) 424-1500

ED DILLS, d/b/a Mid-Georgia Supply,
Plaintiff - Appellee,

v.

The CITY OF MARIETTA, GEORGIA
and Mayor and council of the City of
Marietta, Georgia, Defendants - Appellants

No. 81-7924

United States Court of Appeals,
Eleventh Circuit,

May 6, 1982

Before MORGAN, KRAVITCH and HENDERSON,
Circuit Judges.

LEWIS R. MORGAN, Circuit Judge

On this appeal we are primarily concerned with the constitutionality of restrictions imposed by defendants - appellants, the City of Marietta, Georgia, the city's Mayor and the City Council (hereinafter defendants) on the use of portable display signs. [1] Plaintiff - Appellee Ed dills, who leases and sells portable trailer signs within the Marietta city limits, filed this action on November 18, 1980 in the Northern District of Georgia. He was later joined as a party plaintiff by James Tucker, a Marietta businessman using portable signs to promote sales of his merchandise. Dills and Tucker (hereinafter plaintiffs) sought declaratory and injunctive relief to prevent defendants from enforcing two provisions of the "Marietta Sign Ordinance" which required the removal of portable

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[1] *A "portable display sign" is defined in Marietta's sign ordinances as "(a) mobile, temporary electrical or non-electrical sign that is mounted on skids or portable wood or* metal frame and not permanently attached to the ground." City of Marietta Ordinance No. 3479 (enacted March 14, 1979).

display signs after a specified number of days. [2] Plaintiffs challenged the ordinances on grounds that they constituted an unlawful impairment of contract, resulted in deprivation of property without just compensation and otherwise violated their rights of due process, equal protection and free speech. Defendants answered that the suit was precluded under principles of res judicata or collateral estopel and that the ordinances constituted a lawful exercise of the city's police power. After a hearing, oral arguments by counsel and submission of briefs, the district court granted permanent injunctive relief. The court held that under controlling precedent in this circuit the doctrines of res judicata and collateral estoppel were inapplicable and that the ordinances denied plaintiffs equal protection of the law. For the reasons stated belor, we affirm.

I

Initially, we consider defendants' argument that the instant action should be barred under the doctrine of res judicata. On April 12, 1979 several portable sign manufacturers and users filed suit in the Superior court of Cobb County, CA No. 79-1603, challenging on state and federal constitutional grounds the same tow Marietta ordinances attacked here.

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[2] City of Marietta Ordinance No. 3479 (enacted March 14, 1979). The regulations of portable signs contained in Ordinance No. 3315 (designated as Article II, section 7 in the "Marietta Sign Ordinance") include restrictions on the placement, size, illumination and transportation of portable signs, but plaintiffs only challenge that portion of the ordinance which provides that

> A permit shall not be valid for longer than a perion of one hundred twenty (120) consecutive days after which time the portable display shall be removed from the building setback lines of the premises. A permit cannot be renewed nor can a permit be obtained for the same premises within a period of thirty (30) days after the removal of a portable display from the building setback area of the premises.

This provision was effectively amended (but remains in the " City Sign Ordinance") by Ordinance No. 3479 adding Article V, paragraph 9. That addition reads as follows:

> 9. Portable Display Signs are to be permitted only in the following conditions:
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> c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period.
>
> d. For traffic direction during road construction or emergency situations.
>
> e. For political campaigns, for a maximum of thirty (30) days before any election.

The state court upheld the constitutionality of the ordinances and that decision was affirmed by the Georgia Supreme Court in *Thomas v. City of Marietta*, 245 Ga. 485, 265 S.E.2d 775 (1980), *cert. denied*, 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2s 45 (1981).

(1,2) Under the doctrine of res judicata a prior valid judgment on the merits operates to bar a subsequent suit on the same cause of action if brought by the same parties or their privies. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). Admitting that plaintiffs Dills and Tucker were not parties to the state court action, defendants argue that we should nevertheless find privity under an expanded view of the doctrine of virtual representation. That doctrine provides that "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet General Corp. v. Askew*, 511 F.2d 710, 717 (5th Cir. 1975), *cert. denied*, 423 U.S. 908, 96 S.Ct 210, 46 L.Ed.2d 137 (1975). In *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978), a panel of the former Fifth Circuit held that the doctrine of virtual representation required "an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a suit raising identical issues." *Id.* at 1008. The court below found that such a legal relationship did not exist between the plaintiffs in the instant litigation and those in the state court proceedings, and defendants concede that, as limited in *Pollard*, the doctrine of virtual representation cannot be applied here. Defendants therefore ask us to reconsider the principles of privity as articulated in *Pollard*. This avenue is foreclosed to us even should we desire to take it. The decisions of the former Fifth Circuit handed down by that court prior to October 1, 1981 have been adopted as precedent in this circuit. *Bonner v. City of Prichard, Alabama*, 661 F2d 1206, 1209 (11th Cir. 1981). The Eleventh Circuit has further decided that it should follow "the absolute rule that a prior decision of the circuit (panel or en banc) (can) not be overruled by a panel but only by the court sitting en banc." *Id.* Accordingly, we agree with the district court's conclusion that the doctrine of res judicata does not apply to this action.

II

Having resolved the procedural issue we turn now to the question of whether the challenged provisions of the Marietta Sign Ordinance violate federal constitutional guarantees. although plaintiffs assert several constitutional bases for relief, we focus, as did the district court,

on plaintiffs' claims based on the First and Fourteenth Amendments. The starting point of our inquiry is to examine the character of the ordinances as they affect constutionally protected communication.

Both regulations attacked by plaintiffs restrict the time period for use of portable signs: Ordinance No. 3315 permits us of portable signs for up to 120 consecutive days but then requires removal of the sign for 30 days before it may again be displayed, and Ordinance No. 3479 allows use of portable signs only twice a year for a maximum period of 30 days. At a hearing before the district court, plaintiffs presented evidence that portable display signs offered the most economically efficient means of adv ertising available — i.e. less expensive in relation to effectiveness than any other advertising method. Testimony was introduced to the effect that for a small business with low starting capital permanent signs were not affordable. Plaintiff Dills testified that both ordinances, but especially Ordinance No. 3479, sharply limited the use of portable advertising because short term leases of portable signs were not profitable. The court below therefore concluded that the challenged ordinanced impeded plaintiffs' commercial speech.[3] On appeal defendants do not challenge this conclusion, but instead argue that the burdens imposed on commercial speech by the portable sign ordinances were sufficiently justified by the municipality's interests in controlling etain noncommunicative aspects of the medium.

The district court dedicated a major portion of its lengthy written order to a discussion of the proper test to be applied in determining the validity of governmental restrictions on commercial speech. That discussion has largely bewen rendered obsolete by the subsequent decision of the Supreme Court in *Metromedia, Inc. v. San Diego,* — U.S. —, 101 S.Ct., 2882, 69 L.Ed.2d 800 (1981). In *Metromedia* seven justices

[3] Ordinances 3315 and 3479 also apply to portable signs carrying noncommercial advertising. Plaintiffs do not, however, challenge the constitutionality of the provisions on this basis.

expressed approval of that portion of a San Diego ordinance which proscribed use of off-site commercial billboard advertising. [4] In so doing five justices applied the following four part test originally set forth in *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65, L.Ed.2d 341 (1980):

> (1) The First Amendment protects commercial speech only if that speech concern lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reached no further than necessary to accomplish the given objective.

— U.S. at —, 101 S.Ct. at 2892, 69 L.Ed.2d at 815.

Employing this test in our review of the challenged Marietta ordinances, it is undisputed that the initial, requisite inquiry is fulfilled. The Marietta ordinances clearly encompass speech that is not misleading and that concerns lawful activity. The remaining questions are, however, not so simply answered under the record before us.

(3) On appeal, and before the court below, counsel for defendants argues that the two challenged provisions of the Marietta Sign Ordinance were enacted to further the municipality's interests in traffic safety and esthetics. Although it is well settled that substantial governmental interest exists in the promotion of both these concerns, — U.S. at —, 101 S.Ct. at 2892, 69 L.Ed.2d at 815; *Railway Express Agency, Inc. v. New Your*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); see *Penn Central*

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[4] In *Metromedia* five separate opinions were entered by members of the Court. Six justices agreed that a San Diego ordinance, which sharply restricted billboard advertising contravened First Amendment guarantees. The ordinance permitted on-site commercial advertising but forbade all other billboard advertising including on-site noncommercial advertising. The four justice plurality (Justices White, Steware, Marshall and Powell) bifurcated its examination of the ordinance between the provision's impact on commercial and noncommercial speech. As to its discussion of the regulation of commercial speech, in which the *Central Hudson* test was employed, the plurality was joined by Justice Stevens, who dissented from the resolution of the noncommercial speech issue. Chief Justice Burger and Justice Rehnquist, like Justice Stevens, expressed views that the San Diego ordinance was constitutional as to both the commercial and noncommercial speech aspects. Hence a total of seven justices agreed that San Diego had sufficiently justified a total ban of off-site commercial advertising.

Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 631 (1978); *E. B. Elliott Advertising Co. v. Metropolitan Date County*, 425 F.2d 1141, 1152 (5th Cir. 1970), there is no support for the claims that city officials were concerned about esthetics when enacting time restrictions on the use of portable signs. The Marietta Sign Ordinance is prefaced by a statement that the purpose of the various sign regulations is "to safeguard life, public health, property and welfare. . . " Marietta Ordinance No. 3315 (Article I of the Marietta Sign Ordinance). Such broad, all encompassing statements tend to frustrate judicial inquiry into the real purposed of a gevernmental entity in instituting a restriction on protected activity. They permit after the fact rationalizations for regulations thereby allowing circumvention of the mandate that such measures be defended only on the basis of considerations actually contributing to their enactment. *See Weinberger v. Wiesenfield*, 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975); *see also Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115, 96 S.Ct. 1895, 1910, 48 L.Ed.2d 495 (1976); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981) (former Fifth Circuit opinion). When all-inclusive statements of purpose are used we are forced to look in the record for evidence of the interest underlying a measure. Yet the district court found, and our review of the record confirms, an absence of any evidence that Marietta officials considered portable signs esthetically displeasing. We therefore decline to accept counsel's mere incantation of esthetics as a proper state purpose in evaluating the challenged provisions. *See Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

(4) Unlike the asserted concern for esthetics, a narrow reading of the general statement of purpose prefacing the Marietta Sign Ordinance as well as the obvious aim of most of the measures contained therein support defendants' arguments that concerns for traffic safety at least partially provoked the restrictions on portable signs. But even accepting that then enacting ordinances 3315 and 3479 city officials sought to implement a substantial governmental interest, we are still unable to conclude that the remaining to requirements of the *Central Hudson* test are met. The time restrictions imposed on the use of portable signs do not directly advance the claimed interest in traffic safety. Defendants introduced testimony by an officer with the City of Marietta Police Department that portable signs constitute a greater distraction to motorists than permanent signs. The officer explained that passersby become accustomed to permanent signs and ignore them while a portable sign indicated "something — probably a special" and drew attention. Under this reasoning Marietta's time restrictions on the use of portable

signs do not directly further the claimed interest in traffic safety. In fact the ordinances' effect would be to exacerbate the distracting quality of portable signs by insuring that when a portable sign was used it indeed advertised something special. Citing *Metromedia* and *E.B. Elliott v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970), defendants argue that its allowance of "exceptions" to a total ban on portable sign use does not denigrate the city's interest in traffic safety. While a governmental entity may legitimately decide to remedy a problem on a piecemeal basis, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1954), at some point exceptions can become so inconsistent with the claimed statutory purpose as to render unreasonable any assertion that the measure furthers the claimed governmental interest. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed2d 349 (1972). That point has been reached here.

The Marietta police officer also testified that temporary signs could blow over in severe weather and create an electrical hazard. We again question whether time restrictions on portable sign use address this concern. These doubts are encouraged and the statute at least rendered overinclusive by the application of time restrictions to both electrical and non-electrical temporary signs. Finally, even as to electrical signs the problem can be solved through measures less restrictive of commercial speech, such as requiring anchoring of the signs (a requirement which the record indicated is imposed by other Atlanta area municipalities). Hence we conclude that under the record before us the time restrictions contained in ordinances 3315 and 3479 have not been shown to directly further, or to be narrowly tailored to meet, a claimed substantial governmental interest. The decision of the district court enjoining enforcement of these provisions is AFFIRMED.

35879 THOMAS et al. v. CITY OF MARIETTA et al.

UNDERCOFLER, Presiding Justice.

Appellants here challenge the constitutionality of two sections of the Marietta Sign Ordinance restricting the use of portable display signs. [1] One of the challenged sections sets out the conditions under which such a sign may be used. Marietta Sign Ordinance, Art. V. par. 9: "Portable display signs are to be permitted only in the following conditions: a. Opening or closing of a business, not to exceed thirty (30) days. b. special sale promotional event, or change of ownership or management, not tw exceed twice in any twelve (12) month period, for a maximum of fifteen (15) days. c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period. d. For traffic direction during road construction or emergency situations. e. For political campaigns, for a maximum of thirty (30) days before any election. 9.1. Portable display signs are to be removed from the permitted premises within three (3) days of end of the event or expiration of permit, whichever comes first."

The other challenged ordinance related to the premit requirements. Marietta Sign Ordinance, Art. VI. par. 7(b): "a permit shall not be valid for longer than a period of one hundred twenty (120) consecutive days after which time the portable display shall be removed from the building setback lines of (sic)[2] the premises. A permit cannot be renewed nor can a permit be obtained for the same premises within a period of thirty (30) days after the removal of a portable display from the building setback area or the premises." (Footnote added).

Appellants claim that these sections amount to an abuse of the police power of the City of Marietta, deprive them of their property without just compensation without due process of law, deny them freedom of speech, and constitute an impairment of contracts. The trial court upheld the constitutionality of the ordinance. We affirm.

1. In *City of Doraville v. Turner Communications Corp.*, 236 Ga. 385 (223 SE2d 798) (1976), we held that a municipality may validly regulate the erection and maintenance of signs. The validity of a particular sign

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[1] "Portable Display Sign: A mobile/temporary electrical or non-electrical sign that is mounted on a trailer type frame with wheels or skids or portable wood or metal frame and not permanently attached to the ground." sign Ordinance No. 3315, Art. II, par. 30, as amended.

[2] Although the Ordinance in the record says "of," we think "or" must have been intended.

ordinance, however, depends on the reasonableness of its purpose, operation and effect. The general purposes of the ordinance are spelled out in Article I: "The purpose of this Ordinance is to provide standards to safeguard life, public health, property and welfare by regulating the location, size, illumination, erection, maintenance and quality of materials of all signs, and all signs and outdoor advertising structures." Appellants argue that this is an attempt to regulate aesthetics through the police power. We disagree.

Although aesthetics are an important incidental effect of regulations, *Berman v. Parker*, 348 U.S. 26 (1954), aesthetics, being merely a question of subjective taste, would not alone be enough to support the legislation here under the police power. See *City of Smyrna v. Parks*, 240 Ga. 699 (242 SE2d 73) (1978). This ordinance, however, is clearly reasonably meant to regulate signs which are, in their very nature, temporary. See difinition in footnote 1, supra. The regulations are designed to prevent the use of these temporary signs where a permanent one would be more conducive to the safety and welfare of the public. We do not find these ordinances arbitrary or discriminatory.

2. Having held that the regulation of these temporary signs is reasonable and within the police power, and noting that, although their use is restricted, it is not prohibited, it follows that there is no merit to appellants' due process, inverse condemnation, freedom of speech, or impairment of contracts claims. *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), is distinguishable for this reason.

Judgement affirmed. All the Justices concur, except Marshall, J., who dissents.

SUBMITTED JANUARY 25, 1980 — DECIDED
FEBRUARY 26, 1980 —
REHEARING DENIED MARCH 18, 1980.

Constitutionality of ordinance; vacating of temporary restraining order. Cobb Superior Court. Before Judge Hames.

Charles W. Field, William N. Robinson, for appellants.

Roy E. Barnes, for appellees.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ED DILLS, d/b/a MID-GEORGIA SUPPLY

Plaintiff,

vs.

THE CITY OF MARIETTA, GEORGIA,
AND MAYOR AND COUNCIL OF THE
CITY OF MARIETTA, GEORGIA,

Defendants.

CIVIL ACTION FILE
NO. C80-2001A

ORDER OF COURT

Plaintiff Ed Dills, d/b/a Mid-Georgia Supply, filed this action on November 18, 1980, seeking declaratory and injunctive relief against the City of Marietta. He contends that the City's Ordinance No. 3315 (enacted August 10, 1977) and the amendment thereto by Ordinance No. 3478 (enacted March 14, 1979) are unconstitutional. Those ordinances restrict the times and locations for displaying portable advertising signs.[1]

On April 12, 1979, Gerald E. Thomas, d/b/a J. & J. Exxon and others, including Buddy Cobb, d/b/a/AAA Mobile Ads & Signs, Inc., filed suit in the Superior Court of Cobb County, CA No. 79-1603, contesting the constitutionality of the ordinances involved here. The Superior Court granted a temporary restraining order which it later dissolved after holding a hearing. The Supreme Court of Georgia affirmed, holding that "there is no merit to appellants' due process, inverse condemnation, freedom of speech, or impairment of contracts claims." *Thomas v. City of Marietta*, 245 Ga. 48j5, 487 (1980). Neither the *Thomas* opinion, nor anything presented to this Court, reflects any consideration by the supreme Court of an equal protection challenge to the ordinances. On October 6, 1980, the United States Supreme Court denied the *Thomas* plaintiffs' petition for certiorari. 49 U.S.L.W. 3247.

On March 13, 1980, Buddy Cobb and others filed suit in this Court, C80-434A, challenging the Marietta ordinance. The Court dismissed the *Cobb* case for lack of subject matter jurisdiction, reasoning that the

[1] No. 3478 (Article V, Sections 9-9.1 of the City's Sign Ordinance provides:
Portable Display Signs are to be permitted only in the following conditions:

a. Opening or closing of a business, not to exceed thirty (30) days.

b. Special sale, promotional event, or change of ownership or management, not to exceed twice in any twelve (12) month period, for a maximum of fifteen (15) days.

c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period.

d. For traffic direction during road construction or emergency situations.

e. For political campaigns, for a maximum of thirty (30) days before any election.

Portable display signs are to be removed from the permitted premises within three (3) days of end of the event or expiration of permit, whichever comes first.

No. 3315 (Article VI, § 7 of the City's sign Ordinance) provides:

a. Portable displays may be located within the building setback area provided they are no closer than twelve (12) feet from the curb line and in no case on the street right-of-way.

b. A permit shall not be valid for longer than a period of one hundred twenty (120) consecutive days after which time the portable display shall be removed from the building setback lines of the premises. A permit cannot be renewed nor can a permit be obtained for the same premises within a period of thirty (30) days after the removal of a portable display from the building setback area or the premises.

c. Illuminated portable displays shall be properly grounded.

d. Portable displays using transportation mechanism shall be properly licensed as required by law.

e. The sign area of portable displays shall not exceed 75 square feet. (Amended by Ordinance No. 3342, 11-14-77).

f. The placement of a trailer sign in a parking space which is required to meet the minimum parking requirements of the city shall be prohibited.

g. Each portable trailer display shall have its wheels locked so that only the person renting, leasing, owning or providing the signs shall have the capability of unlocking the wheels.

h. All incadescent bulbs in, or attached to any portable display shall be rated at no more than one hundred (100) watts. Colors of white, red and blue shall be prohibited. No more than ten (10) spot-flood bulbs per face of each trailer sign shall be permitted.

plaintiffs were attempting to obtain federal review of a state court decision. This suit, as previously noted, was filed November 18, 1980.

Dills is in the business of leasing and selling portable signs. His signs are made portable by virtue of the fact that they are affixed to trailers that can be towed by car or truck. Dills leases the trailers to businesses which use them as on-site advertising designed to attract the business of travelers on public roads. He testified at the hearing that his leasing of signs in Marietta has been substantially diminished by the ordinances in question. A witness, Ellison Wheeler, stated that portable signs are the most effective and least expensive form of advertising available and that his business is better when he uses the signs.

The plaintiff has moved to add as a party plaintiff James M. Tucker. Tucker used portable trailer signs to promote his business in Marietta until ordinance No. 3478 was enacted. His business is better when he uses the signs. Other forms of advertising are more costly and less effective for him. The motion to add Tucker is GRANTED as it is meritorious and unopposed.

At the hearing, the City produced evidence that portable signs can blow over and that when they do so they may cause traffic hazards or electrical shortages. Also, the City appears to argue in its brief that portable signs are aesthetically displeasing. There is no evidence in the record directly supporting this position, although a picture of one of Dills' signs appears in plaintiff's exhibit 4. The ordinance itself states that its purpose is "to safeguard life, public health, property and welfare . . ." Ordinance No. 3315 (Article I of the City's Sign Ordinance).

Dills' complaint alleges violations of his rights to due process of law and to freedom of speech. He also contends in his complaint that the ordinances constitute an unlawful impairment of contract and that they deprive him of property without just compensation. Count two of his complaint alleges that Ordinance No. 3315 is unconstitutional in "that there is no rational basis or reason for requiring that at the end of a 120-day period, of display, a sign be removed for at least a 30-day period." The City contends (1) that the ordinances are lawful exercises of its police power and (2) that this suit is precluded under principles of res judicata and/or collateral estoppel because of the *Thomas* case in the state courts.

At the hearing in the case, the Court observed that, if the case reached the merits, plaintiff's best cause of action might be for a denial of equal protection. The Court did not limit the constitutional considerations to equal protection as the defendant states in its brief of December 1, 1980 at p.4. The Court has considered the brief filed by the City of January 16,

1980 with the Supreme Court of Georgia in *Thomas v. City of Marietta*, discussing the other issues. Because defendant has briefed the equal protection issue, and because the evidence relevant to the issue is virtually identical to that relevant to other claims, the Court believes that the complaint should be amended to include a claim for denial of equal protection to conform the complaint to the evidence, and it is SO ORDERED. *See* Fed. R. Civ. P. 15(b).

The case is not presently before the Court on any written motion. Judge Evans signed a temporary restraining order in the case on November 18, 1980, and it is the Court's understanding that the case is presently before the Court on plaintiff's motion for preliminary injunction and defendant's motion to dissolve the TRO. As the parties have had an opportunity to present evidence, oral argument, and written briefs, the Court ORDERS that this order will be the final order in the case unless someone shows cause within fifteen (15) days why it should not be.

I. Preclusive effect of *Thomas*

Defendant argues that these plaintiffs are precluded from asserting their claims here under the doctrines of res judicata or collateral estoppel. Res judicata acts to preclude relitigation of causes of action by the same parties, and collateral estoppel to preclude relitigation of issues usually by different parties. 1B *Moore's Federal Practice* 0.44 (1) (2d ed. 1974). The fundamental issue of preclusion here is whether Dills and Tucker, non-parties to the *Thomas* and *Cobb* cases, are prevented from asserting claims in this case. It is not disputed that the claims raised here are the same as those raised in *Thomas* and *Cobb;* it is also beyond dispute that the equal protection claim raised here could have been raised in the prior cases and thus would be precluded here if res judicata were otherwise appropriate.

Res judicata and collateral estoppel are, of course, difficult concepts in their own right. They are arguably more difficult in a situation like this where the earlier judgment which purportedly has a preclusive effect is the judgment of a state court and where the later action has been filed in federal court. Thus, the question arises whether this federal court, in a "federal question" case, should apply federal or state principles of res judicata and collateral estoppel. Not surprisingly there are cases which quickly conclude that federal principles of res judicata or collateral estoppel govern in such a situation. *E.g., Blonder-Tongue Lab's, Inc. v. University of Ill. Found.*, 402 U.S. 313, 324 n. 12 (1971); *Maher v. City of New Orleans*, 516 F.2d 1051, 1055-56 (5th Cir. 1975); *Pye v. Department of Transportation of the State of Georgia*, 513 F.2d 290, 291-92 (5th Cir.

1975). Other cases, however, acknowledge at least some limited deference to state law, as a matter of federal law, because of 28 U.S.C. § 1738 (which requires federal courts to give full, faith and credit to state court judgments or as a matter of comity. *E.g., Chapman v. Aetna Finance Co.*, 615 F.2d 361 (5th Cir. 1980); *American Mannex Corp. v. Rozands*, 462 F.2d 688 (5th Cir. 1972). *See also Parker v. McKeithen*, 488 F.2d 553, 558 n.7 (5th Cir. 1974) (noting confusion over difference between collateral estoppel and full, faith and credit). The policies underlying section 1738 may be overridden by strong federal constitutional or statutory policies. *American Mannex*, 462 F.2d at 690. For example, the courts often accord state principles of res judicata less deference where plaintiffs seek to vindicate their civil rights. *See e.g. Winters v. Lavine*, 574 F.2d 46, 55 (2d Cir. 1978). Also, a different analysis may be required depending on whether collateral estoppel or res judicata is at issue. *Aeorjet-General Corp. v. Askew*, 511 F.2d 710, 717 n.8 (5th Cir. 1975).

Fortunately, the Court need not determine whether state or federal principles govern, because both provide the same result. The plaintiffs maintain that res judicata and collateral estoppel are inapplicable because the plaintiffs in this case were not parties to the previous cases. The defendant argues that the plaintiffs are precluded from maintaining this suit anyway.

In *Battle v. Cherry*, 339 F. Supp. 186 (N.D. Ga. 1972), Judge Edenfield held the defense of res judicata applicable against non-parties to prior state court litigation. In *Battle* the plaintiffs in the prior case had the same interests and same attoryneys as did the plaintiffs in the federal case, and since the plaintiffs were attacking a statewide funding scheme, the Court and since the plaintiffs were attacking a statewide funding scheme, the Court found that "If the present plaintiffs prevail, the benefits of this action would insure to the (plaintiffs in the prior case) and would in effect render the 1966 decision of the Georgia Supreme Court null and void." As a result, Judge Edenfield concluded there was privity between the two sets of plaintiffs. *Id.* at 192. Here, the plaintiffs are a lessor and lessee of signs as was the case in *Thomas* and *Cobb*. The same causes of action and defenses have been raised in all cases. One plaintiff in this case, Dills, testified that he knew of the previous litigation. Unlike in *Battle*, however, here the benefit of a ruling favorable to the plaintiffs would not necessarily inure to the benefit of anyone other than the plaintiffs in this case. *Battle* is further distinguishable in that Judge Edenfield ruled against the plaintiffs on at least two other alternative grounds. Finally, in *Battle* the first plaintiffs were acting in both their individual capacities and as school board members, and "the proposition that governments may represent private interests in litigation, precluding relitigation, is

clear." *Southwest Airlines Co. v. Texas Int'l. Airlines, Inc.*, 546 F.2d 84, 98 (5th Cir. 1977), *citing Battle* with apparent approval.

In *Pollard v. Cockrell*, 578 F 2d 1002 (5th Cir. 1978), one group of plaintiffs lost in the state courts in an attempt to have an ordinance declared unconstitutional. When identically situated plaintiffs sought the same relief on the same grounds in federal court, the defendant rraised the defense of res judicata. The Fifth Circuit,following *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1148. (5th Cir.), *cert. dismissed*, 400 U.S. 805 (1970), held that res judicata did not apply because the plaintiffs in the federal case were not involved in the previous case " 'either as named parties or as members of a class being represented . . . ' " *Pollard*, 578 F.2d at 1008, *quoting E.B. Elliott*, 425 F.2d at 1148.

Pollard also addressed the question whether the plaintiffs, though not parties to the earlier litigation, might be deemed to be in privity with the plaintiffs in the prior case under the virtual representation doctrine. That principle provides that " 'a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.' " *Pollard*, 578 F.2d at 1008, *quoting Aerojet-General*, 511 F.2d at 710.

The following quotation of the analysis used in *Pollard* amply demonstrates why the plaintiffs in this case are not the virtual representatives of the *Thomas* plaintiffs:

> In this case, the appellees argue, the instant plaintiffs and the *Holt* plaintiffs are massage parlor owners and masseuses having identical interests in a determination of the constitutionality of the ordinance. Furthermore, the plaintiffs in each case are represented by the same attorneys and the complaints are identical except for their jurisdictional averments and the state constitutional points raised in *Holt*. On the other hand, the instant plaintiffs alleged in their complaint — and the defendants do not dispute — that they are not associated with any party to the state court proceeding in terms of ownership, control or management.
>
> We hold that the relationship between the instant plaintiffs and the *Holt* plaintiffs does not amount to the close alignment of interests necessary under the virtual representation doctrine. *Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties*

> *who file a subsequent suit raising identical issues.* In reviewing cases decided under the doctrine, we have described the types of relationships contemplated: "estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee". *Southwest Airlines Co., v. Texas Intern. Airlines,* 546 F.2d 84, 97 (5th Cir. 1977) (Citations omitted) On a similar basis, we have held that, in some contexts, the relationship between a governmental authority as public enforcer of an ordinance and private parties suing for enforcement as private attorneys general "is close enough to preclude relitigation". *Id.* at 98. In the instant case, however, the state court plaintiffs were in no sense legally accountable to the federal court plaintiffs; they shared only an abstract interest in enjoining enforcement of the ordinance. The *Holt* plaintiffs sued in their individual capacities and not as representatives of a judicially certified class. Representation by the same attorneys cannot furnish the requisite alignment of interests in the light of the well established ethical rule that, in areas affecting the merits of the cause or substantially affecting the rights of the client, "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer". American Bar Association, Code of Professional Responsibility, EC 7-7 (1971).

578 F.2d at 1008-09 (emphasis added). The Court thus concludes that the defense of res judicata must fail.

Likewise, the defense of collateral estoppel must fail because the plaintiffs in this case were neither parties to the previous litigation nor did they have a full and fair opportunity to litigate their rights. *E.g., Montana v. United States,* 440 U.S. 147, 164 (1979); *Parklane Hosiery Co. v. Shore,* 349 U.S.322, 330 (1979) (non-party "will not be bound by (previous) judgment. . ." — dicta); *Blonder-Tongue,* 402 U.S. at 329; *Hansberry v. Lee,* 311 U.S. 32, 40 (1940); *In re Nissan Motor Corp., Antitrust Litigation,* 471 F. Supp. 754 (S.D. Fla. 1979).

Even if Georgia law were deemed applicable, neither res judicata nor collateral estoppel would be applicable because the present plaintiffs were not parties to the prior suits. *E.g. Porterfield v. Gilmer,* 132 Ga. App. 463, 466 (1974) ("strangers can neither take advantage of, nor be bound by an estoppel.") The *Porterfield* case refused to abandon even the requirement that the party *asserting* the defense must have been bound

by the previous suit. This latter requirement is an old judge-made rule, which was criticized by Justice Traynor in *Bernhard v. Bank America Nat. Trust & Savings Assn.*, 122 p. 2d 892 (1942). Later, the United States supreme Court adopted *Bernhardt* in *Blonder-Tongue, supra,* and *Parklane Hosiery, supra,* but the Georgia courts have not even adopted the *Bernhardt* rule. *See Porterfield,* 132 Ga. App. at 467-69 (Stolz, J., dissenting).

The policy behind res judicata and collateral estoppel is to encourage reliance upon judicial decisions, to bar vexatious litigation, and to free the courts from resolving disputes already resolved by competent tribunals. *See Brown v. Felsen,* 442 U.S. 127, 131 (1979). Those policies would be greatly served here by accepting the defense offered by the City. Here the same attorney has represented the plaintiffs in all cases. all cases involve the same claims and defenses based upon the same facts. All cases involve plaintiffs who are similarly situated. There is no aspect of the state court litigation which can be deemed unfair or less than fully litigated; the fact that this Court has reached a contrary decision on the merits is just a result of our having a federal system wherein state and federal courts are given concurrent jurisdiction to hear federal constitutional claims.

The only thing these plaintiffs have done differently from the *Thomas* plaintiffs is to choose a different forum. Thus, a rule which allows relitigation in a situation like the one presented here seems to attach a great deal of significance to giving the second plaintiff a choice of forum. Moreover, these plaintiffs would not only be able to engage in forum-shopping, which in itself has been often criticized, but they would be able to do so with the knowledge that one of the potential forums had already ruled adversely to identically situated plaintiffs.

This Court is aware of only one policy that would be promoted by permitting relitigation in a situation like that now confronting this Court. To allow relitigation would serve the prophylactic purpose of making it unnecessary to inquire into the nature of the previous litigation — i.e. such matters as the motives of the parties, the quality of representation, and the fairness of the proceedings. A desire to avoid such difficult questions did not, however, prevent the Supreme Court in *Blonder-Tongue* from abandoning the mutuality requirement; the Court simply decided to resolve those problems on a case-by-case bases. 402 U.S. at 333-34. But *Blonder-Tongue* and *Parklane Hosiery* only involved use of collateral estoppel against a party to the previous litigation. Here, the City attempts to preclude a non-party to the *Thomas* case, and a previously pointed out, *(see pp. 9-10)* both *Blonder-Tongue* and Parklane Hosiery rejected, albeit in dicta, such an application of

collateral estoppel.

The court is thus unaware of any policy relating either to a litigant's right to be heard or to efficient administration of justice that requires the relitigation here of the matters already litigated in the Georgia courts. Nevertheless, the overwhelming precedent discussed above with respect to both res judicata *(see PP. 7-10)* and collateral estoppel *(see pp. 9-10)* requires the Court to hold that plaintiffs are not precluded by res judicata or collateral estoppel from relitigating their claims before this Court.

II. Constitutional Claims

The precise nature of the plaintiffs' claims is not made clear by the pleadings, by the evidence and argument produced at the hearing, or by the post-hearing briefs. The best the Court can descern is that plaintiffs contend that the City's ordinance violates any one or more of several of their constitutional rights in that (1) the ordinance permits the use of portable signs only for short periods of time, and (2) the ordinance does not require similar time limitations for permanent signs. The City contends that it has acted pursuant to its legitimate police power to eradicate the evils of traffic hazards and aesthetic distractions and that in doing so, it is not required to eliminate all similar evils.

The essence of this controversy is a dispute over the extent to which government may regulate advertising that (1) is purely commercial, (2) is used at the advertiser's business location, (3) is designed to attract the business of travelers on public roads, and (4) is the most economically efficient means of advertising available and thus more economically efficient than a similar but less-restricted means of advertising. The legal issues invoke both equal protection and free speech values inasmuch as the City has both impeded plaintiff's speech and done so in a manner that differentiates between types of speech.

A. Equal Protection

Equal protection analysis is primarily two-tiered, applying very strict scrutiny to classification on the basis of "suspect clasifications" and "fundamental rights" and virtually no scrutiny to other legislative classifications. L. Tribe, *American Constitutional Law*, §§16-2, 16-6 (1978). The Supreme Court has phrased this stricter test for judicial scrutiny of legislation in terms of whether the legislation is "necessary to promote a *compelling* governmental interest . . ." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (emphasis in original).

By comparison, however,

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e.g., Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, *see e.g., Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976)

The equal protection standards are result-oriented; under the stricter scrutiny, the government has prevailed only once in the Supreme Court, in *Korematsu v. United States*, 323 U.S. 457 (1957), "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds. . ." 427 U.S. at 306.

Under the "mere rationality" test stated in *Dukes*, the ordinances at issue here are probably constitutional. The ordinances serve the legitimate state interests of safety and aesthetics [2] and they do so in a

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[2] The court need not determine whether aesthetics alone is a legitimate governmental interest. *See* 21 A.L.R. 3d 1222.

rational way. Evidence in the record supports the City's position that portable signs can be unsafe, and any sign is arguably aesthetically displeasing. Although the City has not explained why it differentiated between portable and permanent signs, under *Dukes* it need not do so. the City apparently chose to eliminate the traffic hazards and aesthetic distractions posed by signs a little at a time and it need not eliminate the entire evil at once. The *Dukes* standard is not appropriate in this case, however, because it fails to give any significance to the speech values involved.

The higher level of equal protection scrutiny is likewise not called for here *per se*. The classification employed here is not based on a suspect clasification, and commercial speech, though partially protected under free speech analysis, is probably not a "fundamental right." To hold that commercial speech is a fundamental right would allow the Supreme Court's careful attempts, discussed at length below, to define the protection to be accorded commercial speech under the first amendment to be circumvented by the simple expedient of claiming a violation of equal protection rather than an abridgement of free speech.

Thus, neither of the traditional modes of equal protection analysis should be directly applied here. The Fifth Circuit has observed, however, that "every first amendment claim can be transformed into an equal protection claim merely by focusing upon the classification. . ." *Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295, 304 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). As a result of the equal protection standard of review used must be the same as that which would be accorded the underlying free speech claim. *Id.* The Supreme Court seems to have adopted essentially the same view. *See Police Dep't. of Chicage v. Mosley*, 408 U.S. 92, 95-102. The purpose of using both equal protection and free speech analysis when both are so very similar is that the *method* of equal protection analysis allows the Court to look beyond the goals and means of the legislation as a whole to the specific interest of the state in classifying between two types of speech and the need for doing so in order to effectuate that interest. *Morial*, 565 F.2d at 304.

B. FREE SPEECH

The focus of the discussion will now turn to free speech analysis, but it is important to remember that the discussion is not intended just to build a framework for free speech analysis. In addition, the free speech values discussed below and the level of protection given them may be utilized as a basis for equal protection analysis.

1. Traditional Principles

Generally, free speech analysis requires very strict judicial scrutiny of the ends and means of any legislation regulating the *contents* of speech and less strict scrutiny of legislation regulating only the time, place and manner of speech. *See generally* L. Tribe, *supra* §§ 12-2, 12-20. Regulation on the basis of content is virtually prohibited, but the plaintiffs here could not feasibly argue that the City has regulated their signs on the basis of the content of their message. Rather, the regulation at issue restricts the time, place and manner in which portable signs may be used. Further, the City has differentiated between portable and permanent signs with respect to the time, place, and manner of their use. Generally, in analyzing time, place, and manner regulation, the courts employ a balancing test, weighing the extent to which expression is restricted against the interests served by the regulation, *id.* § 12-20 at pp. 682-83, and when regulating speech in a public forum, legislative bodies must draft their statutes narrowly. *See e.g., Grayned v. City of Rockford,* 408 U.S. 104, 115, (1972); *Hague v. C.I.O.,* 307 U.S. 496, 515-16 (1939) (opinion of Roberts, J.); *Reeves v. McConn,* Slip op. No. 78-3570, p. 1479, 1484-85 (5th Cir. Nov. 24, 1980); *International Society for Krishna Consciousness of Atlanta v. Eaves,* 601 F.2d 809, 828 (5th Cir. 1979); *Westfall v. Board of Comm'rs. of Clayton Co.,* 477 F. Supp. 862, 870-71 (N.D. Ga. 1979); Tribe, *supra,* §§ 12-20, 12-21.

2. Commercial Speech — Supreme Court Cases

This case involves speech that is purely commercial in nature, and commercial speech has only recently been accorded constitutional protection. As a result it is not clear to what extent the principles described above, which have been employed in analyzing restrictions on traditionally protected, non-commercial speech, are applicable here. The Supreme Couirt first accorded first amendment protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (Virginia Pharmacy),* 425 U.S. 748 (1976). At issue in *Virginia Pharmacy* was the validity of a Virginia law prohibiting public advertising of prices for prescription drugs. The Court struck down the law, but very carefully limited its holding by noting:

> There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. compare *Grayned v. City of Rockford,*

408 U.S. 104, 116 (1972); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); and *Kovacs v. Cooper*, 336 U.S. 77, 85-87 (1949) with *Buckley v. Valeo*, 424 U.S. 1; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Cantwell v. Connecticut*, 310 U.S., at 304-308; and *Saia v. New York*, 334 U.S. 558, 562 (1948). Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia Statute, which singles out speech of a particular content and seeks to prevent its dissemination completely.

Id. at 771. although the Court recited a rather strict test for analyzing time, place, and manner regulations, it concluded that "the proper bounds of time, place, and manner restrictions on commercial speech" had been exceeded"(whatever those proper bounds) may be." *Id.*

The Court in *Virginia Pharmacy* also recited several "common sense differences" between commercial and non-commercial speech. *Id.* at 771-72 and n.24. The discussion relates primarily to the low level of protection accorded commercial speech against regulation "to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.* at 772. Commercial speech is subject to such regulation because the typical commercial speaker has better knowledge of the truth or falsity of that about which he speaks than does the typical non-commercial speaker. *Id.* at 772 n.24. For the same reason, the overbreadth doctrine and the prohibition against prior restraints may not be necessary for the protection of commercial speech. *Id.* The Court gave no indication, either expressly or by implication, that time, place, and manner regulation of commercial speech should be accorded different treatment than similar regulation of non-commercial speech.

In subsequent cases, the Court has made several additional statements about time, place, and manner regulation of commercial speech. Also, it has reiterated the distinctions between commercial and non-commercial speech.

In the next commercial speech case, a 5-4 majority of the court upheld against free speech and equal protection attacks an ordinance regulating the location of adult movie theatres. *Young v. American Mini-Theaters*, 427 U.S. 50 (1976). With respect to the first amendment claim, Justice Stevens wrote in Part II of his opinion:

> Petitioners acknowledge that the ordinances prohibit theaters which are not licensed as "adult motion picture theaters" from exhibiting films which are protected by the

First Amendment. Respondents argue that the ordinances are therefore invalid as prior restraints on free speech.

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

It is true, however, that adult films may only be exhibited commercially in licensed theaters. But that is also true of all motion pictures. The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material subject to zoning and other licensing requirments is not a sufficient reason for invalidating these ordinances.

Putting to one side for the moment the fact that adult motion picture theaters must satisfy a locational restriction not applicable to other theaters, we are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment. We turn, therefore, to the question whether the classification is consistent with the Equal Protection Clause.

Id. at 62-63. Although the close of Part II signals a turn to equal protection analysis, the focus of Part III is largely upon free speech principles, and Justice Stevens concluded that "Even though the First

Amendment protects communication in this area from total suppression, we hold that the state may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70-71. Apparently discussing the equal protection claim, he wrote:

> The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. On this question we agree with the views expressed by district Judges Kennedy and Gubow. The record discloses a factual basisd for the Common Council's conclusion that this kind of restriction will have the desired effect. It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 71.

Parts II and III appear to give government very wide latitude in zoning-type, land use legislation, the protections for commercial speech notwithstanding. Several factors weaken this appearance however. First, Justice Stevens' discussion in Part III was joined by only three other Justices. Second a footnote in part II says "Reasonable regulations of the time, place, and manner of protected speech, where those regulations are *necessary* to further significant governmental interests, are permitted by the First Amendment." *Id.* at 63 n.18 (emphasis added). This statement is not followed by the "Whatever may be the proper bounds" qualification used in *Virginia Pharmacy*, and the statement is directly instrumental to the holding that the "regulation of the place...does not offend the First Amendment." *Id.* at 63 (*see* p. 19, *supra.)* Third, the plurality in Part III also qualified its equal protection analysis as follows:

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "the Ordinances do not affect the operation of existing establishments but only the location of new ones."

Id. at 71 n.35.

From footnotes 18 and 35, it appears that time, place, and manner

classifications of commercial speech must pass some test stricter than a mere rational relationship test. Footnote 18 in Part II requires that the means of regulation be "necessary" to the accomplishment of the state's goal. footnote 35 in Part III requires that the regulation leave available alternative means of communication. The purpose of the two inquiries is the same — to look beyond the governmental purpose to the means chosen for effecting that purpose in order to determine whether the legislature can accomplish the same goal with less restrictive regulation that results in leaving open more means of expression. Each footnote is similar in certain ways to the standard for evaluating time, place, and manner restrictions set out in *Virginia Pharmacy* in the sentence preceding the "whatever" qualification. *See supra.* Footnote 18 and *Virginia Pharmacy* both require the government to show a "significant interest." Footnote 35 and *Virginia Pharmacy* focus on alternative means of communication, and as previously discussed, that aspect of the footnote 35 analysis is an essential aspect of an examination of the means by which the government regulates.

The next commercial speech case, *Linmark Assoc's v. Township of Willingboro,* 431 U.S. 85 (1977), involved an ordinance prohibiting the posting of "For Sale" and "Sold" signs on residential property as a means of preventing "white flight" from racially integrated communities. The Court invalidated the ordinance, holding first that the ordinance was not a proper time, place, and manner regulation because it did not " 'leave open ample alternative channels for communication.' " *Id.* at 93, *quoting Virginia Pharmacy,* 425 U.S. at 771. The Court reasoned:

> First, serious questions exist as to whether the ordinance "leave(s) open ample alternative channels for communication," *Virginia Pharmacy Bd., supra,* at 771. Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated — primarily newspaper advertising and listing with real estate agents — involve more cost and less autonomy than "For Sale" signs; cf. *Martin v. City of Struthers,* 319 U.S. 141 (1943); *Kovacs v. Cooper, supra,* at 102-103 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States v. O'Brien,* 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold, cf. *Cohen v. California,* 403 U.S. 15, 25-26 (1971).

The alternatives, then, are far from satisfactory.

431 U.S. at 93.

Just as the standard employed by the majority in footnote 18 in *Young* was instrumental to a holding, so was the test used in *Linmark*. *Linmark* is further significant because the Court reaffirmed, albeit in dicta, that there are "common sense differences" between commercial and non-commercial speech. *Id.* at 98. As in *Virginia Pharmacy*, the differences noted related only to prevention of deception and not to time, place, and manner restriction.

In *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977), the Court again noted the "common sense differences" between commercial and non-commercial speech. As in *Virginia Pharmacy* and *Linmark*, the difference was explained in terms of the speaker's knowledge of that about which he spoke and the need for prevention of deception. Because of that difference, the Court held that the overbreadth docrine does not apply to commercial speech. *Id.* at 381. Again, as in *Virginia Pharmacy*, the Court pointed out no differences between commercial and non-commercial speech relevant to an understanding of how to analyze time, place, and manner regulation of commercial speech. Indeed, the Court made only a limited reference to such regulation in the context of pointing out "certain permissible limitations on advertising." "As with other varieties of speech, it follows as well there may be reasonable limitations restrictions on the time, place, and manner of advertising. *See Virginia Pharmacy*, 425 U.S. at 771." 433 U.S. at 383-84. On the one hand, it is arguable that the language "As with other varieties of speech. . ." tends to indicate that traditional principles dealing with the time, place, and manner restriction apply equally to commercial and non-commercial speech. On the other hand, the general citation to page 771 of *Virginia Pharmacy* seemingly invokes the qualification, "Whatever may be the proper bounds. . ."

In *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), Justice Powell with the concurrence of five other Justices, described the differences between commercial and non-commercial speech in broader language than the Court had previously used in making such a comparison:

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra*, at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of

> speech. 425 U.S., at 771 n.24. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.
>
> 436 U.S. at 455-56.

He pointed out several contexts in which speech is a component of illegal conduct, and then stated:

> In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.

Id. at 457. As in the previous cases, the court thought the overbreadth doctrine inapplicable, but unlike in *Ohralik*, the Court did discuss the merits of an overbreadth argument. *Id.* at 462--63 n. 20.

In *Friedman v. Rogers*, 440 U.S. 1 (1979), Justice Powell cited *Virginia Pharmacy* for the proposition that "restrictions on time, place, or manner of expression are permissible provided that 'they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.'" 440 U.S. 1, 9 (1979), quoting *Virginia Pharmacy*, 425 U.S. at 771. Use of the quote from *Virginia Pharmacy* without the disturbing "whatever" qualification suggests agreement with the quoted test. The suggestion is strengthened when it is recalled that the same quote was used in *Linmark*, 431 U.S. at 93, and that a similar analysis was mentioned by the plurality in *Young*, 247 U.S. at 71 n.35. In the paragraph and accompanying footnote following the quoted language, however, Justice Powell

emphasized, as he did in *Ohralik*, the differences between commercial and non-commercial speech. *Id.* at 10 and n.11. The discussion in the text related primarily to the need for and propriety of preventing deception in commercial speech; the footnote, however, used broader language, reminiscent of that used by Justice Powell in *Ohralik*.

> Because of the special character of commercial speech and the relative novelty of first Amendment protection for such speech, we act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests. Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area. *See, e.g., id,* at 462 n.20 (overbreadth analysis not applicable to commercial speech). When dealing with restrictions on commercial speech we frame our decisions narrowly, "allowing modes of regulation (of commercial speech) that might be impermissible in the realm of non-commercial expression." *Id.*, at 456.

440 U.S. at 11 n.9.

In neither *Ohralik* nor *Friedman* did Justice Powell specifically mention time, place, and manner regulation as an area where commercial and non-commercial speech are distinguishable. In both cases, however, he distinguished commercial and non-commercial speech. Prior cases had based this distinction primarily upon the nature of commercial speech which allows the speaker readily to verify the truth of what he says before he says it. This characteristic of commercial speech makes the overbreadth and prior restraint doctrines inappropriate for analyzing commercial speech restraints. *See e.g., Bates,* 433 U.S. at 380-81; *Virginia Pharmacy,* 425 U.S. at 771 & n.24. To the extent that Justice Powell's opinions in *Ohralik* and *Friedman* may reflect the view that there are other, perhaps as yet undefined, distinctions between the two forms of speech, then those opinions might be read to suggest that time, place, and manner restrictions on commercial speech must be analyzed differently from such restraints on non-commercial speech.

In *Consolidated Edison Co. v. Public Svc. Comm'n,* 100 S. Ct. 2326 (1980), a case involving non-commercial speech, Justice Powell observed, citing *Linmark* and *Virginia Pharmacy,* that "(t)his Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." *Id.* at 2332. This statement is a non-commercial speech case is identical to the test used to formulate one of

the holdings in *Linmark* and to the test mentioned in dicta in *Virginia Pharmacy* and *Friedman*, and it is very similar to the analysis employed by the *Young* plurality in footnote 35. Justice Powell's reference in *Consolidated Edison* to *Virginia Pharmacy* and *Linmark* and his use of the "ample alternative channels" test is also significant because it was he who wrote the opinions in *Ohralik* and *Friedman* which so broadly differentiated commercial and non-commercial speech.

The most recent Supreme Court case dealing with commercial speech appears to be *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 100 S.Ct. 2343 (1980). The question presented was whether the state could ban promotional advertising by an electrical utility company. Justice Powell established the following standard for analyzing regulations of commercial speech:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id. at 2350.

It is unclear how, if at all, the test applies to time, place, and manner regulation. It may be significant that just before the quoted paragraph, the Court set forth several varieties of permissible speech regulation without mentioning time, place and manner. In prior cases the Court has usually listed time, place and manner regulation among those permissible restrictions. *E.g., Bates*, 433 U.S. at 384; *Virginia Pharmacy*, 425 U.S. at 771-730. Perhaps by not including time, place and manner regulation in the list, the Court intended that it would be comprehended by the general standard quoted above. 425 U.S. at 771-73.

Moreover, the test announced is similar to all of those previously mentioned or used in formulating holdings. Like all the tests, it mandates inquiry into the validity of the state's interest to be achieved. The interest,

according to the *Central Hudson* test, must be "substantial"; the previous statements in reference to time, place and manner regulation required that the state's interest be "significant." In addition, "the regulatory technique (the means) must be in proportion to" the state's interest. Justice Powell defined the proportionality inquiry in terms more similar to the "necessity" standard found in footnote 18 of *Young* than to the "alternative channels" approach found in other cases and in footnote 35 of *Young*.

Although there are good reasons supporting the proposition that the Central Hudson standard applies to time, place, and manner regulation of commercial speech, other factors convince this Court that the test does not apply. Mainly, the Court is persuaded by the fact that on its facts the *Central Hudson* case deals with regulation of the content of speech. although heretofore content-based regulation of speech has been virtually prohibited, Justice Blackman only concurred in *Central Hudson* precisely because he believed that Justice Powell's test dealt with content-based regulation. 100 S.Ct. at 2355-56.

After reviewing the Supreme Court cases involving commercial speech, the Court concludes that there is not yet a clearly defined standard for analyzing time, place, and manner restrictions on commercial speech. Two major factors contribute to the uncertainty. First, the Supreme court has repeatedly observed that commercial and non-commercial speech are different. The difference lies primarily in their respective susceptibility to regulation to prevent deception. In addition, however, there is a strong suggestion in Justice Powell's opinions in *Friedman* and *Ohralik that the distinction may run deeper. At present, however, the court has not yet clearly defined any such difference, and it is thus unclear whether principles traditionally employed in analyzing time, place, and manner restrictions on non-commercial speech apply to commercial speech. The only apparent reason for treating the two forms of speech differently across the board is the traditional subjection of commercial speech to complete regulation, see Ohralik,* 436 U.S. at 456, and the resultant novelty of first amendment protection for commercial speech, *see Friedman,* 440 U.S. at 11, n.9.

The other factor creating confusion over the test to be applied is the failure of the Supreme Court to state consistently how time, place, and manner regulations should be analyzed. The cases that mention time, place, and manner restrictions, either in dicta or holding, all require that the governmental interest to be implemented be "significant." *Central Hudson* requires that it be "substantial," but there could not be any real difference between a "substantial" interest and a "significant" one. The real difficulty lies in analyzing the means of achieving the state's goal.

Central Hudson and footnote 18 of *Young* focus on the need for the particular regulation in question. Other cases and footnote 35 in *Young* focus on the availability of alternative means of communication. As previously pointed out, the two inquiried readily coalesce into a single inquiry into whether the legislature could find another way to achieve its goal while imposing less restraint on speech, thus ameliorating somewhat the problem of choosing between standards.

3. Commercial Speech — Lower Court Case

In addition to reviewing the Supreme Court opinions on commercial speech, the Court has examined numerous other cases in an attempt to determine the standards appropriate for analyzing time, place, and manner regulation of commercial speech. The case closest to the instant case factually among the cases of which this Court is aware, appears to be *Hilton v. City of Toledo*, 405 N.E. 2d 1047 (Ohio 1980). At issue in *Hilton* were provisions of the Toledo municipal code prohibiting "flashing portable advertising signs." The Supreme Court of Ohio held first that the regulation in question was within the City's police power. *Id.* at 1049. The court then turned to the argument made here — i.e. that the City unlawfully differentiated between portable and permanent signs:

> Appellees argue in essence, however, that the provisions of the sign code, insofar as they prohibit flashing portable signs, but allow permanent electric signs, are unreasonable and arbitrary, as this differentiation is not, on its face, rationally related to the public health, safety, morals or general welfare.
>
> Numerous authorities have recognized the validity of regulations which permit "on premise advertising," such signs for the most part being of a permanent nature, but which at the same time restrict or prohibit other forms of commercial advertising. *State v. National Advt. Co.* (La. App. 1978), 356 So.2d d 557; *E.B. Elliott Advt. Co. v. Metropolitan Dade County* (C.A.5, 1970), 425 F.2d 1141, 1152, certiorari denied 400 U.S. 805, 91 S.Ct. 12, 27, L.Ed.2d 35; *Schloss v. Jamison* (1964), 262 N.C. 108, 136, S.E.2d 691.
>
> Moreover, appellant's evidence demonstrates that the diffenentiation between permanent and portable signs is predicated upon, inter alia, the difference in the degree to which the signs distract motorist(s) and potentially interfere with the safe operation of motor vehicles. Appellant's

expert witnesses testified that portable signs are generally positioned at a lower level than permanent signs and offer more of a distraction to motorists. Appellees complain also that is arbitrary to permit these devices to be displayed for 15 days, but prohibit their use thereafter. A legislative body, however, is not constitutionally required, in the exercise of its police powers, to legislate with respect to an entire field of possible abuse. Instead, it may recognize varying degrees of the inequity, *New Orleans v. Dukes* (1976), 427 U.S. 297, 96 S.Ct. 2518, 49 L.Ed. 2d 511; *Packer Corp. v. Utah* (1932) 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643; *Longbrake v. State* (1925), 112 Ohio St. 18, 146 N.E. 417, and choose to eliminate or reasonably regulate the area step by step, only partially ameliorating a perceived problem, and deferring its complete elimination to future legislative action. *See, e.g., Williamson v. Lee Optical* (1955), 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563.

Appellant has chosen to partially limit the extent to which portable signs may be displayed. In our view, such action rationally furthers a legitimate purpose and is not arbitrary merely because the enactment failed to reach as far as it could have. Cf. *Katzenbach v. Morgan* (1966), 384 U.S. 641, 657j, 86 S.Ct. 1717, 1727, 16j L.Ed. 2d 828.

Id. at 1050. The opinion fails to deal with two points this Court considers important. first, there is no mention of any claimed abridgement of free speech. Second, the *Hilton* court assumed without discussion that the *Dukes* rational relationship test would apply.

The *E.B. Elliott* case cited in the above quote from *Hilton* is relied upon by the defendant in its brief. (This is the same case discussed above, p.8, in connection with res judicata.) In that case, the Fifth Circuit upheld a Dade County, Florida ordinance which banned, with certain exceptions, all highway billboards within 600 feet of highways; on-site advertising signs were among the exceptions. The plaintiffs attacked the ordinance on several bases including the ground that the ordinance denied them equal protection. The argued that the ordinance illegally differentiated between on-site and off-site advertising. In analyzing the classification, the Court employed the lowest level of scrutiny. Judge Morgan, writing for then-Chief Judge Brown and Judge Tuttle, borrowed the analysis of Justice Brennan written while he was a judge on the Supreme Court of New Jersey:

The business sign is in actuality a part of the business itself,

> just as the structure housing the business is a part of it, and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard as in the case of this ordinance. Plaintiff's placements of its advertising signs, on the other hand, are made pursuant to the conduct of the business of outdoor advertising itself, and in effect what the ordinance provides is that this business shall not to that extent be allowed in the borough. It has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards and similar outdoor structures located by persons in the business of outdoor advertising, justify the separate classification of such structures for the purposes of governmental regulation and restriction.

425 F.2d at 1153 *quoting United Advertising Corp. v. Borough of Raritan*, 93 A.2d 362, 365 (N.J. 1952). Judge Morgan further pointed out that "there is a real difference between the outdoor advertising activity that must necessarily be carried out on the premises where a business is located in order that it may identify itself and attract customers and outdoor advertising which is carried out as a business in itself and which conveys commercial messages unrelated to the other useds to which the premises may be devoted." 425 F.2d at 1154. *Accord, Hiway-Ads, Inc. v. State*, 356 So.2d 501, 504 (La. App. 1977); *Donnelly Advertising Corp. v. City of Baltimore*, 370 A.2d 1127, 1133 (Md. 1977); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741, 758-59 (N. Dak. 1978), *appeal dismissed*, 440 U.S. 901 (1979); *State v. Lotze*, 593 P.2d 811, 815 (Wash.), *appeal dismissed*, 444 U.S. 921 (1979); *Markham Advtg. Co. v. State*, 439 P.2d 248, 256, 262 (1968), *appeal dismissed*, 393 U.S. 316 (1969). *But see Markham*, 439 P.2d at 264 (Hill, J. diss.).

This case, of course, involves no challenge to any differentiation between on-site and off-site signs. The Court does believe, however, that *E.B. Elliott* and the other authorities above support stricter judicial scrutiny of restrictions on on-site advertising because of its traditional function of identifying the advertiser's business and because of its location on the advertiser's own property. In any event, the discussion in *E.B. Elliott* serves to distinguish this case from *E.B. Elliott, Hi-Way Ads, donelly Advertising, Newman, Lotze*, and *Markham as well as many other cases upholding bans on off-site billboards. E.g., Metromedia, Inc. v. City of San Diego*, 610 P.2d 407 (Cal. 1980), *probable jurisdiction noted*, 49 U.S.L.W. 3270 (10/14/80); *appeal dismissed*, 100 S.Ct. 2145 (1980); *Suffolk Outdoor Advertising co. v. Hulse*, 373 N.E. 2d 263 (N.Y.

1977), *appeal dismissed*, 439 U.S. 808 (1978). It is important to distinguish not only *E.B. Elliott*, which is a Fifth Circuit case, but also the numerous state cases in which the United States Supreme Court has dismissed appeals for want of a substantial federal question. *Stuckey's supra; Suffolk, supra; Newman, supra; Lotze, supra; Markham, supra.* Not only is such a dismissal a ruling on the merits, *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975),[3] But *Markham* was cited with approval by the plurality in *Young*, 427 U.S. at 68.

As the Court pointed out earlier, the courts have especially rigouously scrutinized restraints on free speech in a public forum. The public forum doctrine has been applied in commercial speech cases. *E.g., American Future Systems, Inc. v. Pennsylvania State University*, 618 F.2d 252, 255-56 (3rd Cir. 1980); *Newman*, 268 N.W. 2d at 760-61; *State ex rel Dep't of Transp. v. Pile*, 603 P.2d 337,341 (Okla. 1979); *appeal pending*, 100 S.Ct. 2960. *See also Daugherty v. City of East Point*, 447 F. Supp. 290, 295 (N.D. Ga. 1978) (citing public forum cases in commercial speech case). *Newman* and *Pile* involved state laws banning certain highway billboards; in both cases the respective state supreme courts considered the public forum doctrine to encompass advertising addressed to travelers on public roads. *Newman*, 268 N.W. 2d at 760-61; *Pile*, 603 P.2d at 341. *But see, Metromedia*, 610 P. 2d at 419. According to Professor Tribe, the public forum doctrine is derived from a policy of protecting traditional forums and preserving free speech even for those who cannot afford access to more sophisticated means of communication. L. Tribe, *supra*, §12-20 at 683-84. The rationale applies most forcefully here because the portable signs at issue are used precisely because of their cost-efficiency to attract travelers passing by the business at which the signs are located. This Court believes that the public forum characteristic of the signs involved here, like their on-site characteristic, requires added scrutiny by the courts to ensure that the ordinance does not abridge plaintiffs' free speech or deny them equal protection.

The cases which the Court has found have not formulated a precise standard to be employed in evaluating time, place, and manner restrictions on commercial speech. Chief Judge Keady has construed Justice Powell's opinions in *Ohralik* and *Friedman, see* pp. 21-23 *supra*, to mean that the standard for ascertaining what is "'proper' time, place and manner regulation . . . is less restrictive than that which government must meet to regulate noncommercial speech." *Dunagin v. City of*

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[3] *But compare Washington v. Yakima Indian Nation*, 349 U.S. 463, 477 n.20 (1979) (such ruling has limited precedential value).

Oxford, 489 F. Supp. 763 (N.D. Miss. 1980). Unfortunately for us, Judge Keady's ultimate holding turned on other issues, *id.* at 769, and he thus did not reach the issue of precisely what standard should be used.

Several cases have employed the criteria set out by the Supreme Court in *Virginia Pharmacy* and *Linmark* without discussing the standard found in footnote 18 in *Young*. *E.g.*, *John Donnelly & Sons v. Mallar*, 453 F. Supp. 1272, 1277 (S.D. Me. 1978); *Metromedia*, 610 P.2d at 417-18; *Commonwealth v. Sterlace*, 391 A.2d 1066, 1068 (Pa. 1978). *Sterlace* is somewhat significant because the court observed that the government need not use the least restrictive alternative means for accomplishing its goal. *Id.* at 1068, 1070. *But see id.* at 1072 (Mandrino, J., diss.). The other two cases mentioned, *John Donnelly & Sons* (and *Metromedia* followed his reasoning) that a ban on off-site billboards "leaves open ample alternative channels for communication." Among the alternatives he mentioned was on-site advertising, but other possibilities noted were "official business directional signs,. . . tourist information centers and publications (and) other forms of print media, which, like outdoor advertising, enjoy the advantage of being relatively low in cost, such as pamphleteering and leafleting. . . ." 453 F. Supp. at 1280, *quoted in Metromedia*, 610 P.2d at 418. Although these cases are distinguishable from *Linmark* insofar as *Linmard* involved "on-premises" signs, it seems to us that *John Donnelly & Sons* views alternative channels more broadly than did the *Linmark* court.

Other courts have also indicated a sort of general reluctance, of the type suggested by Justice Powell's opinions in *Ohralik* and *Friedman*, to go too far too fast in according free speech protection to commercial speech. *See Dunagin*, 489 F. Supp. at 770; *Florida Canners Ass'n v. State Dept. of Citrus*, 371 So. 2d 503, 519 (Fla. App. 1979). The *Florida Canners* case perhaps best reflects Justice Powell's view in the following passage:

> The protection afforded commercial speech under the 1st Amendment is not commensurate with that afforded personal speech. The Supreme Court recently pointed out that it has not discarded the distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. The Court said that commercial speech is afforded a limited measure of protection, commensurate with its subordinate position in the sacal of 1st Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial

expression. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

> The content of commercial speech is indeed regulated extensively in this country, both in terms of matters prohibited and in terms of information required to be shown. For example, Section 600.11, Florida Statutes (1977), requires specific information on labels of all food products. The Florida Citrus Code directs Respondent to prescribe rules and regulations governing labeling for the purpose of showing specified information. The validity of regulations pertaining to the content of commercial speech has been traditionally tested on due process and commerce clause grounds, not on 1st Amendment guarantees of freedom of speech.

371 So. 2d at 518-19. The problem, simply put, is that commercial speech has long been subject to extensive regulation which was only minimally scrutinized by the courts.

C. Summary of Equal Protection and Free Speech Principles

The ordinances at issue here have two alleged defects. First, they impose a near-total ban on the use of portable signs. Second, they impose different regulations on portable and temporary signs. The defects result in unlawful time, plane, and manner restrictions on plaintiffs' freedom of speech and denial of equal protection.

Equal protection analysis is primarily two-tiered. The lower, mere rationality, test does not apply here because it fails to accord any significance to the plaintiffs' speech values at stake. The upper level of scrutiny is likewise not applicable *per se* because commercial speech is apparently not a fundamental right. The applicable equal protection standard must be attuned to the level of judicial scrutiny reuired by freedom of speech analysis. The *method* of equal protection analysis is significant nevertheless, because it allows the inquiry to focus upon whether the state needs to differentiate between permanent and portble signs in order to accomplish its goal.

Turning to speech analysis, it is clear that we are dealing with commercial speech, and it is clear that we are not dealing with an attempt to regulate the content of anyone's speech. The Court thus must ascertain what standard governs judicial review of government action that regulates the time, place and manner of commercial speech.

As is apparent from the lengthy discussion above, the Court is not aware of any controlling case clearly setting forth such a standard. When dealing with time, place, manner regulation of non-commercial speech, the courts have employed a balancing analysis. It is unclear how much weight such precedent has where commercial speech is involved. Commercial speech and non-commercial speech are thought to be different — primarily because with commercial speech, the speaker can more easily ascertain the truth or falsity of the speech. As a result, commercial speech is more readily subjected to regulation designed to promote truth. There also is some suggestion in Supreme Court and lower court opinions that there may be other differences between commercial and non-commercial speech, perhaps because regulation of commercial speech has traditionally been extensive and subject to very limited judicial review.

The Supreme court has set forth two similar standards (one in footnote 18 in *Young* and the other in *Virginia Pharmacy, Linmark* and *Friedman*)for evaluating time, place, and manner regulation of commercial speech. Those standards require the Court closely to examine the means employed by the state to achieve its goal, and they seemingly permit or even invite a balancing analysis. In applying those tests, either in free speech or equal protection analysis, the Court must be mindful that the signs at issue are on-site signs which are a part, albeit a temporary part, of the lessee-plaintiff's business. Also, the Court must consider the fact that the signs at issue convey a message in a public forum. The speech involved here is a traditional form of speech — advertising — delivered from a traditional location — the advertiser's business location — to a traditional audience — passersby — in a traditional forum for speech — the public streets. Finally, however, the Court must also bear in mind the long tradition of strict regulation of commercial speech. Each of these factors can be recognized in the context of the standards set out by the Supreme Court for evaluating time, place, and manner restrictions on commercial speech.

The first issue under either of the Supreme Court standards is whether the ordinances serve a "significant" government interest. Traffic safety and aesthetics are among the most significant interests of local governments, and those interests become even more significant if considered in light of the long tradition of municipal interest in those matters.

The real difficulty lies in analyzing the means employed by the City to effect its purpose. First, because the signs are used on-site and in a public forum, they are the most cost-effective means of advertising available. Thus, the Court concludes that either a complete ban on portable signs or

a ban such as the one at issue here, with limited time exceptions, does not leave open ample alternative channels for communication. Also, it cannot be said that a complete ban on portable signs or a ban with limited exceptions as to time is "necessary" to the achievement of the chosen goals of safety and aesthetics, because the City has at its disposal numerous alternative means of achieving its goals. Its disposal numerous alternative means of achieving its goals. Regulations concerning signs' size, distance from the street, stability, and electrical safety are necessary to the goal of eliminating traffic hazards, and likewise, regulations concerning size, illumination, and color bear a necessary relationship to the goal of promoting aesthetics. Such regulations would also far less severly infringe the available avenues for expression than would a complete or partial ban on portable signs.

Because the City's differential treatment of portable and permanent signs with respect to the times they may be used is not "necessary" to the achievement of its goal and because such a classification does not leave open ample alternative channels of communication, the ordinances are an unlawful restraint on the time, place, and manner of plaintiffs' speech and deny plaintiffs equal protection of the law. Article VI, 7, (a),(c)-(h) (p. 2 n.1 *supra*) contains provisions which are necessary to the promotion of aesthetics and safety and which do not impose a significant burden on the availability of means of expression; accordingly those provisions are not unconstitutional.

III. Summary

Thus, The Court GRANTS plaintiffs' motion for injunctive relief as to Article V. §§9-1.1 and Article VI, §7 (b) and DENIES the City's motion to dissolve the Temporary Restraining Order. As previously set forth, the Court GRANTS plaintiff's motion to add Mr. Tucker, and ORDERS the amended complaint filed. This order shall be the final order in this case, unless any party shows cause within ten (10) days why it should not be.

In reaching this conclusion, the Court has reluctantly reached a decision that is somewhat at odds with the rulings of the State courts in *Thomas*. It should be noted, however, in reaching this decision, the Court has considered several legal theories which the plaintiffs apparently failed to present to the Georgia courts. This Court reached the merits only after deciding that *Thomas* has no preclusive effect here. Under the United States Constitution the State courts are, of course, as competent as federal courts to rule on federal constitutional issues. If we were writing on a clean slate, we might well conclude that principles of federalism and preclusion by prior conclude that principles of federalism

and preclusion by prior judgments makes *Thomas* binding here. For the reasons set forth in Part I of this order, however, we do not reach that conclusion. Regrettably we have had to do the same work done by the judges in the State court system, even though there is not a hint or suggestion, in or outside of the record, that the *Thomas* plaintiffs received anything other than the fairest, most competent treatment at the hands of the State courts. Even more regrettably we have reached a decision that is different from that reached by the State courts in *Thomas*.

SO ORDERED, this 20th day of March, 1981.

Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7294

ED DILLS d/b/a MID-GEORGIA SUPPLY,

Plaintiff - Appellee

versus

THE CITY OF MARIETTA, GEORGIA, and MAYOR and COUNCIL OF THE CITY OF MARIETTA, GEORGIA

Defendants - Appellants

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 6, 11 Cir., 1982, _____F.2d_____).
Before MORGAN, KRAVITCH, and HENDERSON, Circuit Judges

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Phyllis Kravitch
United States Circuit Judge

Dated: September 30, 1982

AMENDMENT (1)
CONSTITUTION OF UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CITY OF MARIETTA SIGN ORDINANCES

City of Marietta Ordinance No. 3315 (enacted August 10, 1977) and No. 3479 (enacted March 14, 1979).

> **A permit shall not be valid for longer than a period of one hundred twenty (120) consecutive days after which time the portable display shall be removed from the building set back lines of the premises. A permit cannot be renewed nor can a permit be obtained for the same premises within a period of thirty (30) days after the removal of a portable display from the building set back area of the premises.**

This provision was effectively amended (but remains in the "City Sign Ordinance" by *Ordinance No. 3479* adding Article V. paragraph 9. That addition reads as follows:

> **9. Portable Display Signs are to be permitted only in the following conditions:**
>
> **a. Opening or closing of a business, not to exceed thirty (30 days.**
> **b. Special sale, promotional event, or change of ownership or management, not to exceed twice in any twelve (12) month period, for a maximum of fifteen (15) days.**
> **c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period.**
> **d. For traffic direction during road construction or emergency situations.**
> **e. For political campaigns, for a maximum of thirty (30) days before any election.**

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for the Appellees with two copies of the foregoing Petition for Certiorari by depositing said copies in the U.S. Mail with adequate postage affixed thereon, to: Charles W. Field, Esquire, Suite 180, 2022 Powers Ferry Road, Atlanta, Georgia 30339.

This _____ day of December, 1982/

ORIGINAL SIGNED BY
ROY E. BARNES

ROY E. BARNES

IN THE

Supreme Court of the United States

NO. 82-1089

THE CITY OF MARIETTA, GEORGIA
AND MAYOR AND COUNCIL OF THE
CITY OF MARIETTA, GEORGIA

Petitioners

v.

ED DILLS, d/b/a/ MID-GEORGIA
SUPPLY AND JAMES M. TUCKER

Respondents

ON WRIT OR CERTIORARI
TO THE ELEVENTH CIRCUIT
UNITED STATES COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSTION

CHARLES W. FIELD
2022 Powers Ferry Road
Suite 180
Atlanta, Georgia 30339
(404) 953-0375

Attorney for Respondents

QUESTION PRESENTED

Was the Eleventh Circuit Court of Appeals correct in affirming the lower Court decision that the ordinance in question is unconstitutional?

IN THE

Supreme Court of the United States

THE CITY OF MARIETTA, GEORGIA
AND MAYOR AND COUNCIL OF THE
CITY OF MARIETTA, GEORGIA

v.

ED DILLS, d/b/a MID-GEORGIA
SUPPLY AND JAMES M. TUCKER

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents' respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Eleventh U.S. Circuit Court of Appeals. That opinion is reported as case no. 81-7294 (Eleventh Circuit, 1982).

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TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The Respondents agree with the statement of the case as stated by the Petitioners through the first paragraph on page 7 of their Petition. At this point, the Petitioner's statement of the case greatly differs from that of the Respondents. The instant case which was originally filed by Ed Dills and James Tucker against the City of Marietta in the United States District Court for the Northern District of Georgia, Civil Action File No. C80-2001A (1981). These two individuals had at no time any connection whatsoever with any of the plaintiffs in the preceeding litigation, other than that they happened to be involved with the same industry. These plaintiffs were in no way a party to the previous litigation, nor have the Petitioners shown any connection whatsoever between these plaintiffs and Respondents herein with the preceeding litigation.

The Respondents agree with the remainder of the Petitioners' statement of the case, with the deletion of the last two paragraphs thereof.

REASONS FOR DENYING THE WRIT

I. TIME, PLACE AND MANNER RESTRICTIONS ON PURE COMMERCIAL SPEECH ARE NOT JUSTIFIED EVEN WHEN WEIGHED AGAINST THE COMMUNITY NEED FOR SAFETY REGULATION AND ASTHETIC AND ECONOMIC DEVELOPMENT, WHEN SUCH RESTRICTIONS UNFAIRLY INFRINGE UPON CITIZENS' FIRST AMENDMENT RIGHTS.

The District Court and the Eleventh Circuit Court of Appeals have both ruled that the ordinance in question is unconstitutional as violative of the Plaintiffs' First Amendment protection on commercial speech. The Court of Appeals refused to grant an en banc hearing, obviously seeing no problem with the three-judge panel's decision. The Court of Appeals was bound by the latest pronouncement from the Supreme Court in the case of *Metromedia, Inc. vs. San Diego,* 453 U.S. 413, 69 L. Ed2d 341 (1980), to the ordinance in question and held that the ordinance, in restricting the use of the signs in question, violated the Plaintiff's First Amendment rights to freely disseminate lawful commercial information that is not misleading.

In contradiction to the Petitioners' contention that the ordinance must either totally allow or totally prohibit the signs in question, the Court of Appeals merely considered the fact that the ordinance allowed the signs in question to be displayed at certain times as an attempt to avoid the ordinance being declared to be a total ban upon the signs. In fact, the ordinance amounts to a virtual ban upon the signs because of the severely restrictive term limitations.

It must be further remembered that the ordinance in question in this case is aimed at totally on-site advertising. The effect of the ordinance is, as stated above, to virtually ban this

particular type of on-site advertising. A crucial distinction to be observed is that the ordinance in *Metromedia* permitted on-site commercial advertising, and the constitutional attacks were made on the off-site commercial advertising and non-commercial billboards, both on and off-site.

At any rate it is still probably true that the *Hudson* test applies to this case. However, the Court of Appeals correctly held that the last two requirements of the *Hudson* test were not met in this case. The Court of Appeals merely held that the ordinances in question do not directly advance the City's claimed interest in traffic safety. As opposed to shackling the City's governmental powers, the decision rendered by the Courts as they stand merely state the proposition that no reason has been shown for infringing upon the Plaintiff's First Amendment rights by the virtual banning of the signs in question.

The Petitioners state the Court is confronted with a question, namely: "Are restrictions on the use of portable display signs justified for public health and safety reasons when matched against a businessman's right to disseminate commercial speech?" Respondents respectfully submit that, at least in the case at bar, the answer is not. The quite simple reason for this answer is that regardless of the claims of the City's need for restriction of these signs for public health and safety, there has been no showing whatsoever that the restriction of these signs in any enhances public health and safety.

For this reason the Writ should be denied.

II. RES JUDICATA DOES NOT BAR PLAINTIFFS SUCH AS RESPONDENTS IN THIS CASE FROM SEEKING JUDICIAL RELIEF WHEN THEY WERE NEITHER PARTIES TO NOR IN ANY WAY CONNECTED TO PREVIOUS PARTIES TO SIMILAR LITIGATION.

The District Court and the Court of Appeals held that the Plaintiffs herein are not barred from asserting their claims by

the doctrine of Res Judicata. The Petitioners completely ignore the fact that this issue has been resolved squarely against them in several cases. The Petitioners appear to be asking this Court to extend the doctrine of virtual representation to bar Plaintiffs from pursuing their case in Federal Court merely because others have preceded them in State Court litigation, even though there were absolutely no express or implied legal relationship between the parties in the two litigations. In other words, the Petitioners are asking this Court to rule that merely having a similarity of interests constitutes virtual representation. Respondents respectfully submit that this is not only an illogical result, but is directly opposite to previous holdings of this Court. See eg, *Aerojet General Corp. v. Askew*, 511 F2d 710, 717 (5th Cir. 1975), cert. denied, 428 U.S. 908, 96 S. Ct 210, 46 L.Ed2d 137 (1975).

Respectfully submitted,

CHARLES W. FIELD
Attorney for Respondents

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for the Petitioners with two copies of the foregoing Respondents' Brief in Opposition by depositing said copies in the U.S. Mail with adequate postage affixed thereon, to: Roy E. Barnes, 166 Anderson Street, Marietta, Georgia 30060.

This 24th day of March, 1983.

CHARLES W. FIELD

CONCLUSION

For the reasons herein specified, it is respectfully requested that the Petition for Certiorari be denied.